

Moral Damages: The French Awakening in the Nineteenth Century¹

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“But the law will only award money; and what is money when it comes to consoling love, of replacing glory, flattering hopes, and all the illusions which make up part of our happiness?”

—Philippe-Antoine Merlin³

In the history of moral damages in Europe, French jurisprudence was particularly important and influential. France developed Europe’s first liberal regime of compensation, and it did so by an evolution rooted in the *Code Civil* and spearheaded by its judiciary.

The decisive period in which this occurred was the nineteenth century, particularly in the last three decades of that century. At an earlier date, when the 1804 *Code Civil* was freshly-minted, the texts stood silent and opaque about the recoverability of non-pecuniary harm and there was little indication of the path the law would eventually take. True, the texts were wide enough to read in the possibility of awarding such recoveries,⁴ but they could just as easily have been read as reflecting the views handed down by Jean Domat and Robert Pothier, who were generally hostile to the recovery of anything other than patrimonial loss, and especially hostile

1. This article is largely based upon my earlier research on moral damages which was published as Chapter 3 of Vernon Valentine Palmer (ed.) *The Recovery of Non-Pecuniary Loss in European Contract Law* (Cambridge Univ. Press 2015), pp. 58-76.

2. Thomas Pickles Professor of Law and Co-Director of the Eason Weinmann Center for International and Comparative Law, Tulane University.

3. « Mais elle [la loi] ne donnera jamais que de l’argent; et qu’est-ce que de l’argent, lorsqu’il s’agit de consoler l’amour, de remplacer de la gloire, des espérances flatteuses, et toutes les chimères même qui font une partie de notre bonheur? » *Répertoire Universel et Raisonné de Jurisprudence*, Tome III, p158 (4eme ed. Paris 1812).

4. Neither CC art 1142 which spoke broadly of “inexécution,” nor art. 1149 which spoke of “perte,” nor art. 1382 which only referred to “dommage,” necessarily excluded or included moral damages. The texts did not distinguish between inexécution causing pecuniary or non-pecuniary harm, nor whether loss or damage was to be understood in a purely patrimonial sense. Mazeaud, Mazeaud & Tunc, *Responsabilité Civile* 424-425 (6th ed. 1965). There were, however, a few scattered texts in the Civil Code, Code of Civil Procedure and the Penal Code which did recognize moral prejudice in particular situations. See Lucienne Ripert, *La Réparation du Préjudice dans la Responsabilité Délictuelle* (Paris 1933), p. 32.

to the recovery of moral damage in the field of contract law.⁵ Domat espoused the dogmatic view that contract damages should never reflect particular considerations that might make a thing more precious in the eye of the purchaser: “For the price of things is not regulated by affection, which may make them more valuable to some than to others; but only on the foot of what they may be worth to all persons indifferently. That is the rule in regard to contractual damages.”⁶

The silence or opacity of the *Code Civil*, however, would not erase the memory of the pre-revolutionary legal experience. The many “*injures*” that received monetary redress in the Old Regime were not easily forgotten, nor were prominent actions such as breach of promise of marriage and seduction in which pleaders customarily sought various forms of non-pecuniary damages. An *injure* typically meant an intentional assault by word or deed upon another person’s honor and dignity.⁷ Honor and dignity were of capital importance in the *Ancien Régime*, and affronts assumed myriad forms.⁸ Awarding money as redress had long been standard practice in actions involving defamation, calumny, insult, seduction, broken promises of marriage, adultery, revelation of secrets and

5. Mazeaud/Tunc, *Responsabilité Civile* (6eme ed 1965) pp. 397-8, no. 298-99, said the old French authors, unaware that Roman law in its final phases made no distinction between delictual and contractual actions for the recovery of immaterial harm, mistakenly held that breach of contract could only give rise to the recovery of patrimonial loss: “Domat et Pothier sont formels sur ce point; ils se fondent, par ignorance, sur le droit romain.” Note, however, that the *Répertoire Universel et Raisonné de Jurisprudence*, (1777 ed. J-N Guyot; 1812 ed. P-A Merlin) apparently espoused a more liberal point of view. See Vol III, p. 158, verbo “Convention:” which states that by the law of nature, we are under a duty not to injure the affections or honor of another person, and though these injuries are not readily appreciable in money, a pecuniary indemnity is recoverable at civil law.

6. Jean Domat, *Civil Law in its Natural Order*, Vol I, No. 1972, p. 778 (Strachan trans. 1850, Rothman reprint 1980). This traditional aversion was widely shared in Europe and was passed on from the Netherlands to South Africa where it remains strictly observed. A modern South African decision declares that there is no Roman-Dutch law authority which generally allows damages for any non-patrimonial loss caused by breach of contract: “None of our old authorities does as much as hint that in Roman-Dutch law intangible loss could be recovered in contract. On the contrary some of them make it clear that what may be recovered is *damnum*, i.e. patrimonial loss. Voet 45.1.9 treats damage as nothing else than the diminution of an estate.” Per Van Heerden, J.A. in Administrator, Natal v. Edouard 1990(3) SA 581(A) at p. 595.

7. On the subcategories of *injuria* recognized in early modern law, see John Blackie, “Doctrinal History of the Protection of Personality Rights in Europe in the *Ius Commune*: General Actions or Specific Actions” 13.1 EJCL (March 2009) pp. 7-13, available at www.ejcl.org.

8. See Claude-Joseph de Ferrière, *Dictionnaire de droit de pratique* (Paris 1769) pp. 77-78; Francois Dareau, *Traité des Injures* (2 vols) (Paris: Nyon 1785); Rachel Couture, « *Le règlement judiciaire de l'injure à Paris au xviii siècle: Collaboration entre la justice conciliante et les justiciables avertis* » (Mémoire 2008, Montréal) pp. 46-47.

confidences, violation of sepulchers, interception of private letters, denial of honorific rights, and the intentional infliction of bodily harm.

As early as 1685 it is recorded that the *Parlement de Paris* compensated a bereaved widow and her children for the assassination of her husband. The plaintiffs received a pecuniary sum designed to dry tears and afford consolation.⁹ A comment on the decision stated: “All the authors say that the civil reparation adjudged to the widows for the death of their husband is given to wipe away their tears and bring some consolation to their pain.”¹⁰ It might have supposed that granting a balm in money to the bereaved was likely an innovation of modern French law, but the decisions of the *Parlements* shows the practice was in place long before. Early French jurists were perfectly aware that their law dealt with *la perte d’affection* and *pretium doloris* in a way Roman jurists would not have condoned. A commentator noted in 1683: “The Romans were persuaded that the life of a man . . . cannot receive estimation; . . . In our practice, however, one awards damages. This is not because we have put a price on the life of men nor these other things that the Romans held to be inestimable. But we estimate the damage that one suffers by the loss of these things.”¹¹

Under pre-revolutionary procedure the victim of an *injure* was permitted to seek “civil reparations” as *partie civile* attached to a criminal prosecution.¹² In these proceedings civil reparations meant “the sum of money which was adjudged to the civil party in compensation for the damage which the crime or delict had caused to him.”¹³

The modern expression “moral damage” (*dommage moral*) was not used and is not found in the early books. Instead, we only find broad and imprecise phrases which were apparently applied indiscriminately, regardless whether the loss was pecuniary or non-pecuniary: for example, “*intérêt des parties*,” “*dommages-intérêts*,” “*intérêt civils*,” and “*réparations civiles*.” Under these standards plaintiff’s damages might be

9. Journal des Audiences, tome III, p. 985, cited in A. Dorville, p. 39.

10. Journal des Audiences, tome III, p. 985, quoted from the French (my translation) in Armand Dorville, *De L’Intérêt Moral Dans Les Obligations* (1901), p. 44.

11. Quoted from the Note to the decision of 3 avril 1683 (awarding 3000 livres to a widow whose husband who had been assassinated) quoted in Armand Dorville, *De L’Intérêt Moral Dans Les Obligations* (1901), p. 40, (my translation).

12. The *partie civile* procedure originated in sixteenth century ordonnances. See verbo « *partie civile* » in Achille Morin, *Dictionnaire du Droit Criminel* (Durand 1842). For its later role under the Code Pénal (1810), see infra n. 21-22 and accompanying text.

13. Guyot, Verbo « *Réparations civiles* », Tome XV, p. 193 (my translation).

purely non-pecuniary or they might be lumped with pecuniary damages that were sustained.¹⁴

Recoveries awarded in criminal proceedings before the *Parlements* were a free mix of reparations and repression.¹⁵ The offender might be obliged to perform an *amende honorable* or an *amende profitable* and thus undergo punishment and pay reparations. Stripped to his shirt, with torch in hand and a rope about his neck, the offender begged for God's and the King's forgiveness. At the same time he made apologies and/or retractions to the victim and paid an indemnity in money.¹⁶ The indemnity awarded as *amende profitable* was not formally designated as moral damages, yet it fits our modern description. It was a discretionary amount meant to satisfy the non-patrimonial harm created by the *injure*. The amount would vary in accordance with the victim's rank, condition, and suffering.¹⁷

The use of generic expressions to englobe both pecuniary and non-pecuniary injury shows there was no sharp distinction between damage of one kind or the other. The bipolar vocabulary of today (pecuniary vs. non-pecuniary loss) was conspicuously absent in the years before the Code. The single word "damage" simply did double duty, and this nonchalant practice, it is submitted, was important to the Code's future interpretation. The meaning of "dommage" in the *Code Civil* was undefined, and yet it was central in tort and contract. But was it not natural to think the word might carry forward the same inclusive meaning that it once bore in the pre-code jurisprudence?¹⁸ Armand Dorville had no doubt on the matter.

14. See François Dareau, *Traité des Injures* (2 vols) (Paris: Nyon 1785). The strong link to criminal law is suggested in the book's subtitle: « Ouvrage qui renferme particulièrement la Jurisprudence du Petit-Criminel. » See also, M. Fournel, *Traité de la Séduction, Considérée dans l'Ordre Judiciaire* (Paris 1781).

15. Jean-Marie Carbasse et Bernadette Auzary-Schmalz, « La douleur et sa réparation dans les registres du Parlement médiéval (xiii-xiv siècles) », in B. Durand, J. Poirier, J-P Royer (eds) *La Douleur et le Droit* (PUF 1997), pp. 429-430, (« la réparation et la répression sont très souvent conjoints . . . dans la pratique pénale du Parlement »).

16. See Claude-Joseph de Ferrière, *Dictionnaire de droit de pratique 77-78* (Paris 1769); Joseph-Nicolas Guyot, *Répertoire universel et raisonné de jurisprudence civile*, t. 1, p. 365 (1777); F. Dareau, *Traité des injures*, passim.

17. See F. Dareau, *Traité des injures*, Vol II, pp. 425 ff (Paris 1785). It was thought logical that a public officer suffers more from a "mauvaise imputation" than a simple bourgeois would suffer, and a beautiful woman would deserve greater compensation for disfigurement than a woman who was not as beautiful. *Ibid.* pp. 426-427.

18. Tribune J.D.L. Tarrible's discourse before the Corps Législatif in 1802 suggests that he understood moral damages to be protected by C.C. Arts. 1382-1383.: « Cette disposition embrasse dans sa vaste latitude tous les genres de dommages et les assujettit à une réparation uniforme qui a pour mesure la valeur du préjudice souffert . . . Tout est déclaré susceptible d'une appréciation qui indemniserà la personne lésée, des dommages quelconques qu'elle a éprouvé. » (my emphasis) Quoted from Dorville, p. 76.

Indeed he did not think the French jurisprudence of the nineteenth century was actually an innovation. The judges were simply inspired by an older jurisprudence. On this view the rulings and recoveries during the *Ancien Régime* afforded not only the historical precedent but provided the initial template for recognition of moral damages in civil actions under the Civil Code.¹⁹

THE *PARCOURS* OF THE CONCEPT IN THE CIVIL LAW

If the recovery of moral damages began historically with actions by the *partie civile* in criminal proceedings, it would later spread to delictual actions on the civil side (at first perhaps only civil actions which coincided with crime) and finally to emerge in contract actions as well.²⁰

At the beginning of the century, the *Code Pénal* (1810) created various crimes that were meant to repress immaterial harms. There were crimes dealing with insulting words, calumny, immoral outrages, arbitrary detentions, false arrest, false testimony, mishandling of cadavers, and adultery.²¹ The sanctions of the criminal code were imprisonment and/or fines, but the victim of these crimes, as *partie civile*, could demand monetary compensation if the damage was considered personal and direct.²² Thus the criminal law served as a platform for private parties to recover moral damage in statutorily-defined situations. The amount that might be recovered was at large—there was no tariff or table in the criminal code regulating or limiting the scope of civil reparations. If

19. Armand Dorville had no doubt that the jurisprudence of the *Parlements* was the direct ancestor of France's modern praetorian development: "It is not true that the French jurisprudence innovated when it timidly sketched, in the first quarter of this century an evolution ending with the recognition of the principle of money reparations for moral damage. Far from having innovated, the jurisprudence was nothing but inspired by our old jurisprudence." Dorville, *supra* p. 32. The view was advanced by Mazeaud, Mazeaud and Tunc, *Responsabilité Civile Délictuelle et Contractuelle*, Tome I, No.318, p. 410 (6eme ed. Montchrestien 1965).

20. I am referring to a progressive shift away from the criminal law in nineteenth century French legal history. This is not to deny the basic unity of penal and civil law on issues of personality rights in earlier law. See John Blackie, *supra*, p. 21: ("That parties had remedies that today we characterize as "civil" and that punishment could be imposed, which today we characterize as "criminal" did not alter this [unity]. The substantive law was one and the same.")

21. See Code Pénal (1810), Arts. 114-122, 330-340, 341-344, 358-360, 361-377, and the discussion *supra* notes 12-16 and accompanying text. *Encyclopedia Dalloz*, Tome 4, Responsabilité, No. 168 (1954) states that *dommage moral* was first redressed under the French penal code (Arts. 117-119). Roscoe Pound made much of the point that the foundation for protecting immaterial interests in domestic relations under French law was in the criminal law. The *iniuria* suffered by a husband or wife was not dealt with in the Civil Code as such, but left chiefly to the penal code where provision was made for prosecution at the instance of an injured spouse. Roscoe Pound, "Individual Interests in Domestic Relations" 14 Mich. L. Rev. 177, 189 (1916).

22. Code of Criminal Procedure, Arts. 2 and 3.

defendant was tried and convicted, the court could not refuse to assess the victim's damages. It was required to award a discretionary sum.²³ The victim's subjective appreciation of his or her injury affected the initial decision to prosecute. No criminal pursuit was initiated without the consent of the private party. Functionally speaking the process was not so different than an autonomous action in delict under the civil code, except that here the victim's action was closely attached to the law of crimes and the size of the award was assessed by a criminal tribunal. Well into the nineteenth century we are told by certain writers that strict dependence on the law of crimes was the proper order of things and that the civil code offered no independent action for moral damages of its own.²⁴

THE PHARMACISTS OF PARIS AND THE HONOR OF THE PROFESSION

An historic step in severing the civil action from the penal code, however, was taken by the Court of Cassation in a famous 1833 decision by the *Chambres Réunies*.²⁵ The Court ruled that the damage sustained by the pharmacists of Paris (who had intervened as *partie civile* in criminal proceedings against unlicensed individuals unlawfully practicing the profession of pharmacist), was of a moral nature that was compensable under Art. 1382 of the *Code Civil*. As described the defendants were retail vendors of secret, unauthorized remedies (*les débitans de remèdes secrets non autorisés*) who had infringed the pharmacists' "intérêt moral" and had damaged the "honneur" of the profession.²⁶ Apparently the pharmacists of Paris found it difficult—perhaps impossible—to show that the defendants had caused them patrimonial loss, but the absence of such proof, said the Court, did not render their demand *non-recevable*. The general tort articles, arts. 1382-83 would recognize the "moral damage" they had sustained. As a result of the ruling, the word "dommage" in the general tort article was split in two and now covered material and immaterial loss.²⁷ What made the decision a landmark was perhaps not so much that

23. For instance, in proceedings for calumny in 1819, Rothier was sentenced to a month in prison and to pay a fine of 150 fr. and then to pay M. Devilliers 440 fr. for his dommages-intérêts. Cass. Crim. 22 oct. 1819, D.1819.119.

24. For the views of Larombière and Aubry et Rau, see *infra* n. 58-59 and accompanying text.

25. Baget c. Rosenweigh, Cass. (Ch. Réunies) 15 juin 1833, Sirey 1833.I.458.

26. See 15 June 1833, Sirey 1833.I.458. Procureur Général Dupin drew attention to a damage « tout moral, la conservation de l'honneur et de l'exercice consciencieux de la profession. » See also Devilleneuve et Carette, *Lois et Arrêts*, 461 (1833).

27. In due course doctrine coined a new term to express the distinction—the *moral tort*. Aubry et Rau, Vol 4, 4th edn. 1871; Larombière, *Des Obligations*, Vol 5, No. 27 (1869). Laurent, *Principes* §522 (1893).

moral damage was recovered (that had been occurring all along via the *partie civile* procedure), but rather the recognition that the Civil Code alone could serve as the foundation for its recovery.²⁸ This ruling of the Court of Cassation sitting in plenary assembly (*Chambres Réunies*) of course carried great weight.

The growth of an autonomous civil action that was no longer tethered to the law of crimes began to germinate in the decisions. Grellet-Dumazeau pointed out that while wrongs like defamation and injure remained crimes under the Penal Code, one could now bring a purely civil action under Art. 1382 to recover losses even in circumstances where the elements of the crime were not strictly fulfilled, for example when the prescriptive period for the crime had already elapsed.²⁹ Even when an *action civile mixte* (Dumazeau's term for *la partie civile*) was brought, the criminal tribunal now treated civil liability as depending on separate and independent criteria. For example, in a case where plaintiff's husband was killed in a duel, and the jury acquitted his adversary of the crime of voluntary homicide, the court nevertheless awarded the wife, as civil party for herself and her children, a large sum for material and moral damages under article 1382 of the *Code Civil*.³⁰

EXTRA-LEGAL FACTORS IN THE EXPANSION OF MORAL DAMAGES

It is believed that extra-legal factors in the nineteenth century would have contributed to the need for an independent civil action. France experienced rapid economic and technological change that caused new pressure for the protection of personality rights. The industrial revolution which first began in England reached France by mid-century, bringing with it a capital-intensive economy featuring steam engines, dangerous machinery, and a large-scale railway system.³¹ European countries were also experiencing a wave of technological developments that brought

28. It was not actually the first case to award moral damages under the Civil Code's tort provision. Well before then, jilted *fiancées* had recovered under C.c. Art. 1382 for immaterial injuries in 'promise of marriage' actions. See e.g. Cour d'Appel (Toulouse), 2eme ch., 8 mars 1827, S. 1825-27.2.343; Cour d'Appel (Colmar) 1 Mars 1825, D.1825.2.153.

29. Etienne André Grellet-Dumazeau, *Traité de la diffamation, de l'injure et de l'outrage*, Vol II, (Leboyer 1847) Nos. 863-864.

30. See Cas. Crim. 20 fev. 1863, D. 1864.1.99; S.1863.1.321.

31. See generally Fernand Braudel and Ernest Labrousse, *Histoire économique et sociale de la France*, Tome III (1789-1880) (Presses Univ. de France, 1976) pp. 241-273 ; Henri Sée, *Economic and Social Conditions in France During the Eighteenth Century* (Batoche Books 2004, Zeydel transl.) pp. 86-94.

about the first mass-circulation newspapers,³² increased commercial advertising, the spread of hand-held cameras,³³ tele-photography, the invention of the radio and telephone. All of these advances significantly increased the incidence, the occasions and the varieties of immaterial harm. The prying eyes of the press, the appropriation of names and images in advertising, the photographing of illustrious figures on their deathbed or in their private activities, gave rise to demands for privacy.³⁴ An impressive number of litigants sought protection from the courts.³⁵ There was pressure on the legal system to protect these non-patrimonial interests and to use money damages as a practical remedy.³⁶ Among the claims were the moral rights of authors and artists over their creations,³⁷ the right to control use of one's own image and name, the right to privacy, to autonomy, and to human dignity.³⁸ These claims all centered around the non-bodily aspects of personality.³⁹ The judicial response in France created a protective shield that was different in form and content from the static and limited protections under criminal law.

The *Affaire Rachel* (1858), for example, was a decisive step in the recognition of the right to privacy and the control of one's own image. When the famous actress Elizabeth Rachel Félix⁴⁰ lay on her deathbed, her sister Sarah commissioned a drawing to be made of her face that she

32. The first high-circulation newspapers arose in London in the early 1800s (e.g. *The Times*). The development was facilitated by high-speed rotary steam printing presses and the use of the railways for wide distribution. In France, *Le Figaro* was founded in 1826 and had the highest circulation.

33. R.E. Mensel, "'Kodakers Lying in Wait': Amateur Photography and the Right to Privacy in New York 1885-1915" 43 *Am. Quart.* 24 (1991).

34. See S.C. Warren and L.D. Brandeis, "The Right of Privacy" 4 *Harv. L. Rev.* 193 (1890); Vernon Valentine Palmer, "Three Milestones in the History of Privacy in the United States" 26 *Tul. Eur. & Civ. Law Forum* (2011) pp. 67-97.

35. See Giorgio Resta, "The New Frontiers of Personality Rights and the Problem of Commodification: European and Comparative Perspectives" 26 *Tul. Eur. & Civ. L. Forum* 33, 35 (2011); C. Derobert-Ratel, *Le droit de la personne sur son image à l'aube de la photographie*, R.R. J. Droit Prospectif 89 (2005).

36. Resta, *supra* p. 35.

37. Raymond Lindon, *Les droits de la personnalité*, No. 498, p. 286 (Daloz 1974), citing Trib. de la Seine, 17 August 1814 and l'affaire Lecocque, 25 June 1902, and stating that the latter decision raised for the first time the notion of the right of personality.

38. See Gert Brüggemeier, "Protection of Personality Interests in Continental Europe: The Examples of France, Germany and Italy, and a European Perspective" in Niall Whitty and Reinhard Zimmermann (eds), *Rights of Personality in Scots Law* (Dundee Univ. Press 2009), pp. 316-317. Brüggemeier describes these as "hybrid rights"—different from public-law constitutional rights as well as private-law subjective rights—and more like a kind of "private human rights."

39. Pierre Kayser, *La protection de la vie privée par le droit*, (3rd ed. 1995) Nos. 66, 81.

40. This celebrity (1821-1858) enjoyed a wide reputation in Europe for her work in the classical repertoire of Racine, Corneille and Voltaire.

intended solely for herself. Somehow, however, unauthorized copies based upon the commissioned original were exhibited and commercially marketed.⁴¹ It was not clear that the defendants committed any crime by circulating these images; nevertheless, the *Tribunal de la Seine* ordered the seizure and destruction of the sketches and the payment of moral damages to Rachel's relatives. The Tribunal declared:

No one may, without the express consent of the family, reproduce and make available to the public the features of a person on his deathbed, however famous this person has been and however public his acts were during his life. The right to oppose such a reproduction is absolute; it flows from respect for the family's pain and it should not be disregarded;

This pronouncement recognized an "absolute" right of privacy in such circumstances, even for the most celebrated and famous.⁴² The case played a significant role in producing the emerging vocabulary of "personality rights" in France.⁴³

DEVELOPMENTS TOWARD THE END OF CENTURY

It is undisputed that the greatest growth in the jurisprudence of moral damages took place in the last three decades of the nineteenth century.⁴⁴ The principal developments of this period took place in cases involving loss of affection, broken promises of marriage, the effects of marriage and divorce, the consideration of others, liberty of thought, respect for the dead, and good morals. Perhaps the most striking of these developments, at least in terms of judicial boldness, were the decisions recognizing *pure* affective loss.⁴⁵ For example, where defendant's negligence caused the death of the head of the family, his spouse and children were compensated for their grief and suffering. Of course this claim was conceptually separate and distinct from a claim for the loss of the decedent's material support.⁴⁶ This was patent in a case where a child was accidentally killed

41. Trib. Civ. Seine, 16.6.1858, D.1858.3.62.

42. The death-bed photograph of Prince Bismarck in 1898, obtained by trespassing and a bribe of household staff, was another famous incident of this kind.

43. On the introduction of this terminology in France, see M.E.H. Perreau, « *Des droits de la personnalité* » 1909 RTDC 501.

44. Jean Ganot, *La réparation du préjudice moral*, 82-83 (Thèse Paris 1924).

45. It was above all here where questions were raised as to whether the judges did not go too far in extending reparations to the owner for the loss of his horse (1500 fr.) or his dog (600 fr). Weill and Terré, *supra*, No. 612, p. 628.

46. Aix, 6 May 1872, Dalloz 1873.2.57. F. Laurent, *Principes de Droit Civil Français*, vol 20, (5eme ed 1893), p. 569, secs. 522, 525, treated this as a leading case. See also Th. Huc, *Commentaire Théorique et Pratique du Code Civil*, vol. 8 (Librairie Cotillon 1892), p. 547, sec. 413. This holding was confirmed by the Cour de Cassation's decision of 13 Feb. 1923 in which it

through defendant's fault: the parents were indemnified purely for their grief. The recovery was not in any way patrimonial, as they were in no way dependent upon the child for material support.⁴⁷ These late nineteenth century actions seem qualitatively different from the criminal actions for injury to honor in the pre-codal jurisprudence. The civil defendant in the late nineteenth century cases was liable though he had not *intentionally* caused the victim's suffering or the suffering of his relatives,⁴⁸ and though the latter's bereavement had little to do with matters of "honor" and "dignity." Furthermore, these recoveries extended moral damages to a larger class of claimants. The circle of potential plaintiffs now extended beyond the family bloodline, so as to include a brother-in-law or a *fiancée* of the deceased. Even concubines and unmarried persons were eligible to recover for loss of affection.⁴⁹

Moral damages were recognized in other significant situations. In connection with acts of adultery, a husband was entitled to demand compensation from his wife's paramour for the harm the husband endured.⁵⁰ Where a child was unlawfully detained the child's parents were compensated for distress and worry about her safety.⁵¹ Plaintiff recovered when his name was entered as a candidate for political office without his knowledge or permission.⁵² Moral damage was recovered when a deceased member of the family was autopsied without the family's permission. Neighbors disturbed by noises, odors, and emanations coming from defendant's property were entitled to damages.⁵³

was recognized that the children of a man who was killed by defendant's horse, had been damaged in their "dearest affections" for their father and deserved compensation under Article 1382 CC. DP 1923, 1. 52; F. Terré et Y. Lequette, *Grands arrêts de la jurisprudence civile*, vol 2 (12th ed 2008), no. 183.

47. A. Sourdat, *Traité Général de la Responsabilité*, Vol I, §33 (Paris: LJDG 1876).

48. The *Code Civil* recognized all grades and gradations of fault, but French criminal law made criminal intent a necessary element of nearly every crime. The current Code Pénal, art 121-3, still declares this principle: « Il n'y a point de crime ou de délit sans intention de le commettre. » The Common Law during its later development adhered to this principle in criminal law. William Sloan, "The Development of Crimes Requiring No Criminal Intent" 26 *Marquette L. Rev.* 92 (1942).

49. Cass. Ch. Mixte, 22 fev. 1970, Bull. Ch. Mixte No. 1, D. 1970, 201, note Combaldieu.

50. Ibid. §34. As early as 1837 the criminal chamber of the Cour de Cassation ruled that a husband victimized by adultery was entitled to compensation for his injury since article 1382 of the *Code Civil* and Code d'Instruction arts. 1 and 3 could not be limited to compensation for material damages. *Crim.* 22 September 1837, Sirey 1838, 331.

51. Discussed in M. Planiol et G. Ripert, *Traité pratique de Droit civil Français*, Vol. 7, No. 551 (Paris 1954).

52. Nancy, 8 March 1893, S.93.2.103.

53. Dorville, pp. 97-99.

THE CONTEMPORARY CRITICISM

By the close of the century the majority of French doctrine looked favorably upon this judicial development,⁵⁴ but dissenting and critical voices were also on record.⁵⁵ Some writers took the position that moral damages should be cantoned into a narrower sphere. It should be restricted to actions involving honor, social consideration, and reputation. These writers in effect argued for a smaller and bounded moral patrimony, similar in size and scope to that which the Romans and the judges of the *Ancien Régime* had recognized. This smaller sphere might well have excluded recovery for pain and suffering (*pretium doloris*) or for bereavement over a loved one's death (*perte d'affection*) since these interests arguably did not involve the protection of honor and reputation.⁵⁶ Certain other writers took the position that non-pecuniary damages should be recoverable only when it was accompanied by economic loss or was mingled in some way with economic loss. In this way they wished to exclude recovery for "pure" moral damage, such as might result from defamatory statements devoid of economic impact, or distress and depression over the death of a loved one, or perhaps an interference with paternal authority.⁵⁷ The insistence on at least some accompanying economic loss was again designed to eliminate "pure" moral damage and reduce the instances of recovery. Yet another group of writers maintained that moral harm should never be civilly actionable unless the defendant's act constituted a criminal offence (*un délit criminel*). This would controlled recoveries via a requirement of concurrence. Civil awards would then be *numerus clausus*, like the law of crimes. Larombière, for

54. Baudry-Lacanterie et Barde, *supra* n. 14, no. 2871, pp. 1098-1110. Timely essays and doctoral dissertations effectively documented and diffused the result in the doctrine. See Chausse, *De l'intérêt d'affection*, 24 *Revue Critique* 446, 1895; Armand Dorville, *De l'intérêt moral dans les obligations* (Thèse Paris 1901); Mantelet, *La réparation du préjudice moral* (Thèse Paris 1907), Pierre de Mallon, *L'Intérêt Moral dans les Obligations Légales* (Caen 1911). In time this evolution came to be appreciated by leading authors. For example Marcel Planiol did not devote any space to moral damages in the 1900 edition of his treatise. By 1921, however, he discussed it (approvingly) in his treatment of *dommages-intérêts*. See Marcel Planiol, *Droit Civil*, vol II, s. 252, p 90 (Paris, 8eme ed. 1921).

55. Discussed in Suzanne Carval, *La construction de la responsabilité civile: Controverses doctrinales* (Paris: PUF 2001), Chapter VII, pp. 267-294. A number of modern authors remain critical as well. See Flour, Aubert et Savaux, *Les obligations*, vol. 2, no. 139, Viney et Jourdain, *Les conditions de la responsabilité*, No. 254; André Tunc, *Pour une loi sur les accidents de la circulation* (Economica 1981) p. 268.

56. For this position, see Laborde, *Revue critique* (1894) p. 26; Claude Mangin, *De l'action publique et de l'action civile*, no. 123 (1839); and Trébutien, *Cours de droit criminel*, vol. II, p. 25.

57. See Meynial, *Revue pratique*, 1884, p. 438 ff; Dalloz, Supplément, « Responsabilité », §278 ff.

instance, declared that judges had no power to order remedies for “*ces torts moraux*” unless the injury stemmed from a preexisting penal violation. Any attempt to go beyond this limit, he said, would be illegal and non-binding.⁵⁸ Aubry et Rau similarly argued that there should be no recovery of such damages unless the offender had committed a *délit criminel*.⁵⁹

These various critical and dissenting views, however, were the views of a minority of writers. The judicial expansion of continued unchecked by them.⁶⁰

A SEPARATE LOOK AT PRETIUM DOLORIS

In the historical account traced to this point, the issue of pain and suffering arising from corporal injuries has not been discussed or referred to as a type of moral damages. In today’s law it is clearly recognized and usually referred to as *pretium doloris*.⁶¹ A most curious aspect of the nineteenth century French jurisprudence, however, is that this head of damage was not overtly dealt with or recognized as a head of loss in the decisions. Perhaps more remarkably, it was conspicuously omitted in some of the most detailed studies of the period, such as the studies by Armand Dorville and Jean Ganot.⁶² The omission seems surely odd because there is a widespread tendency to regard the “pain and suffering” arising from corporal injuries as the best known and the oldest form of moral damage. Today in Europe it is accepted everywhere without

58. M.L. Larombière *Des Obligations*, tome V, (1869); Aubry et Rau, tome 4, §§444-445 (4th ed. 1871). The Italian Civil Code made use of the concept of concurrence to limit the recovery of moral damages. It may be noted, however, that this strategy offers little or no constraint where personal injuries are concerned. Since nearly every voluntary or negligent act causing personal injuries or death is considered a crime under the Criminal Code, moral damages may normally accompany recovery. See McIntosh and M. Holmes, *Personal Injury Awards in Eu and Efta Countries*, 395 (Kluwer 2003).

59. Aubry et Rau were perhaps influenced by the philosophical position taken in the Baden Civil Code of 1809 which sought to repress moral damages. That code, though it was in other respects clearly modeled upon the French Civil code, explicitly denied recovery in tort for loss of honor and/or pain and suffering. The drafters deliberately modified the scope of Art. 1382 and in the *exposé des motifs* they expressed disdain for such indemnities: “In local legislation, it has always been considered unworthy of a free individual to permit his honor to be appraised in an estimatory action for damages or his emotions to be assessed through an indemnification for pain and suffering, allowing himself thereby to be treated as an object of commerce.” Official Advisory Opinion (cited in Stoll).

60. See authorities collected in G. Baudry-Lacantinerie et L. Barde, *Droit Civil*, Vol.3, s. 2871, (note 3) p. 1100 (Paris 1905).

61. See *Juris Classeur*, Fasc. 101, No. 5, Civ. Code art. 1382-1386 (2005).

62. Armand Dorville, *L'Intérêt Moral Dans Les Obligations* (1901); Jean Ganot, *La réparation du préjudice moral*, 82-83 (Thèse Paris 1924).

qualification, even by countries with the most illiberal attitudes toward non-pecuniary damage.⁶³ Thus it is rather natural to assume that its recognition must have preceded the more sophisticated concept of moral damage that developed in nineteenth century France.⁶⁴ The only difficulty with this claim of historical priority is to find supporting evidence, for it is surprisingly sparse. The explanation, however, lies in the fact that the material and moral elements in personal injury cases are so closely connected that the indemnity for both was lumped together in global awards. The award for pain and suffering was included all along, though it was effectively hidden from view. It will be remembered that determinations as to the victim's damage lay within the *pouvoir souverain* of the lower courts, which means that as a practical matter the line between pecuniary and non-pecuniary elements in the award was shielded from appellate review.⁶⁵

On this question I believe that Hans Stoll's observation about the treatment of moral damage in European systems deserves to be considered. Stoll pointed out that the more that restrictive legal systems (such as the German or Austrian) sought to limit compensation for non-pecuniary harm, the stronger was the tendency to demand *distinct* awards distinguishing one type of harm from the other, that is, to require two separate claims and two separate awards.⁶⁶ By that same logic, however, surely there would have been little inclination or need in a liberal system like France's to specially earmark awards for pain and suffering.

Furthermore, the inner logic of the French jurisprudence points to this conclusion. We have already seen that the *ricochet* victim (for example a wife grieving for a deceased husband) was allowed to recover for her grief and suffering. That recovery suggests that her husband, the primary victim, must have been entitled to recover for his own pain and suffering. It would have been grossly illogical for judges, on the one hand, to compensate the ricochet victim for *her* distress, as the cases in fact did,⁶⁷ and yet, on the other hand, deny the primary victim's claim for his *own*

63. Reinhard Zimmermann, "Comparative Report", in B. Winiger, H. Koziol, B. Koch, R. Zimmermann (eds). *Digest of European Tort Law*, Vol 2: Essential Cases on Damage (De Gruyter 2011), p. 710; Hans Stoll, "Consequences of Liability Remedies" Vol IX, Intern. Ency. of Comparative Law (Tübingen 1983), Chap. 8-§40.

64. Michel Cannarsa, "Compensation for Personal Injury in France" <http://www.jus.unitn.it/cardoza/review/2002> (maintaining that pretium doloris was established as a head of damages long before *dommage moral* appeared.

65. As Lucien Ripert put it, "The indemnity is higher than it would have been if the material loss had alone been in question, and it includes the moral loss within it." L. Ripert, No. 28, p. 33.

66. Stoll, 8-§43.

67. See supra note 46 ff, and accompanying text.

suffering. We can be relatively sure that what was permitted for the indirect victim would not have been denied to the direct victim. Returning then to an earlier explanation, it is most likely that the primary victim's pain and suffering was simply indemnified, without itemization, by a global award.⁶⁸ Of course this question was finally clarified by later decisions (by the 1920s at the latest) when pain and suffering began to receive explicit treatment.⁶⁹ The term *pretium doloris* was then applied and all doubt as to its recoverability was removed.⁷⁰

THE EXTENSION OF MORAL DAMAGE INTO THE FIELD OF CONTRACT

As noted earlier, the liberal regime which French judges ultimately built sprang from a Civil Code that was initially silent on the subject of moral damages. It soon became clear that recoveries under the Civil Code were available not only in tort but in contract as well, despite the admonitions of jurists like Pothier and Domat. From a fairly early point in the century French courts began to award compensation for moral damages caused by breach of contract. In the well-known case of *Rosa Bonheur* (1865) the famous artist was found to be in breach of her agreement to execute and deliver a painting to her patron, Monsieur Porchet. The Paris Court of Appeal ordered her to pay 4,000 Fr. to satisfy both the moral and material damages she had caused.⁷¹ One may note a few recoveries in contract against hairdressers whose incompetence allegedly caused aesthetic damage to their clients.⁷² These cases may have

68. See e.g. Trib. Seine, 9 janv. 1879, SI 1881.2.21 where an accident victim suffered for 23 days before dying. The court assumed that his pre-death suffering would have been actionable if the victim had brought suit in his name before his death. See also Trib. Toulouse, 17 avril 1902, S. 1905.2.81, note Lacoste, where the same assumption is made. In an 1887 case a passenger was injured in attempting to descend from a train after it had overshot the station and passed beyond the *quai*. The railway was held liable on the basis of both breach of the contract of carriage and violation of the general tort article, (“obligée *ex contractu et ex delicto*”). According to the Aix Court of Appeal, defendant was required to compensate for *all* harms to the passenger, from the “slightest inconvenience” to the “gravest lesions” he may have incurred. Aix, 12 déc. 1887, S. 1888.2.138. Pain and suffering was no doubt included within this sweeping formulation.

69. Givord, pp. 73-74 and 87-88, citing inter alia, Nimes 13 mars 1855, D.P. 186-2-161, Aix 12 dec. 1887, S. 1888-2-138, Paris, 9 dec. 1921, Gaz. Pal. 1922-1-686 Paris 13 janv. 1926, Gaz. Pal. 1926-1-351.

70. See e.g. Paris, 9 dec. 1921, 5eme ch., Gaz. Pal. 1922.686.

71. Paris, 1ere, 4 juillet 1865, D. 1865.2.201.

72. Givord, p. 83.

recognized the principle; however, they were not numerous and were not a driving force behind the extension into contract.⁷³

A more potent source of pressure, it is believed, came from the great volume of railway accidents in which the carriers were held accountable, under contracts of transportation, for the bodily injuries and sufferings of passengers and their families. In his Sorbonne lectures of 1923, Professor Albert Wahl made an explicit argument that railway carrier liability under contracts of transportation (obviously ubiquitous in French life) spearheaded the recognition of pure affective loss and moral damages in general.⁷⁴ In the same vein Jean Ganot pointed out that a sharp rise in claims for moral damages occurred in and around 1870. That was approximately when the construction of the railway network in France reached its present day extent.⁷⁵ Ganot repeated Wald's argument that it would have shocked the judicial conscience to say that a carrier of both goods and passengers was contractually bound to make good all losses for damaged merchandise, but would not be obliged to make good the moral harm caused to an injured passenger.⁷⁶ The matter of fairness and justice was easily perceived in this type of case because contractual liability and tort liability applied in parallel fashion to the same accidents, injuries, victims, and family members. To allow moral damages to be recovered in tort by certain claimants of an accident and deny it in contract to other claimants would have appeared inconsistent and unjust. This prompted Givord to conclude that if the parties and the underlying fault were the same, there should be no distinction in the two regimes about the recoverability of moral damage.⁷⁷

73. According to Weill and Terré contract creditors generally sought moral damages with less frequency than tort plaintiffs, and the jurisprudence *ex contractu* was less audacious at first, though later it too evolved liberally. *Supra* No. 391, p. 394.

74. The lectures may have followed the plan of his treatise, Albert Wahl, *Précis théorique et pratique de droit commercial* (Bordeaux 1922) pp. 428-436, Nos. 1274-1295. Shortly after the turn of the century, the Court of Cassation reversed the view that liability toward the passenger was extracontractual under Art. 1382. It now recognized the contractual character of the obligation. *Cass Civ.* 21 Nov. 1911, 27 janv. and 21 avril 1913, S.12.1.73, 13.1.177, 14.1.5 (notes Lyon-Caen), D. 13.1.249.

75. See F. Braudel and E. Labrousse, *Histoire économique et social de la France*, Tome III, (Presses Univ. de France, 1976), Fig. 26. p. 296 showing the network in 1878.

76. Ganot, pp. 113-114.

77. Givord pointed out that where the faulty operation of a train caused the death or injury of a passenger, the parents or close relatives of the passenger would demand reparation for their material and moral damage in tort, since they had no contractual tie with the railway. However, the liability of the railway toward the direct victim, the deceased or injured passenger, had to be based upon the breach of a contractual obligation, and if he or she cannot recover his moral damages (e.g. pain and suffering) simply because of the contractual nature of the action, then effectively the direct victim would have less rights than the ricochet victim. In order to avoid such an anomaly, he

“It would be *illogical* to distinguish . . . between the consequences of a delictual fault and of the contractual fault; it would be *illogical* to show less severity in the contractual sphere, just because there is a voluntary engagement on the part of the debtor . . . The solution accepted for the one goes necessarily for the other;”⁷⁸

DESCRIBING THE FRENCH ACHIEVEMENT

Once moral damage was freed, conceptually speaking, from the tutelage of criminal law and was allowed to spread to injuries unconnected with the commission of a crime, the courts were placed in a position to recognize interests ranging well beyond intentional affronts to honor and reputation. New-found interests could be asserted and recognized, unfettered by the more elevated *scienter* requirements associated with the *injure*. The analysis of fault under the general tort article called for indemnity even for slight fault. The breach of certain contracts in fact could be shown without any proof of fault. Courts could now develop a more coherent concept of moral harm consisting of any suffering, grief, or contrariety experienced in relation to corporeal, material, and sentimental interests.⁷⁹ Hans Stoll once suggested that France’s achievement in this regard was to place pecuniary and non-pecuniary harm on “an equal plane.”⁸⁰ That seems correct but it was not the only achievement. Few systems in Europe, and certainly none at an earlier date, placed moral damages on an equal plane *in both tort and contract*,⁸¹ and it may be noted that this jurisprudential development was singular in the way it evolved. It emerged through an introspective interpretation of the Civil Code without the intervention of special statutes nor any flight to higher-law principles. It flourished despite the criticism of certain writers and the counter-example of certain European codes.

concluded, it should be irrelevant whether the underlying basis of liability is conceived as contractual or delictual.

78. Givord, p. 86. (my translation and emphasis added).

79. Philippe Le Tourneau, *La Responsabilité*, No. 31, Ency. Dalloz (2009).

80. Hans Stoll, “Consequences of Liability: Remedies”, *International Encyclopedia of Comparative Law*, Vol. XI (Tubingen 1983), Chapter 8. At the time of writing Stoll noted only Belgium and Luxembourg had reached a comparable position. However, it appears that Spain’s broad concept of non-pecuniary harm has likewise expanded into the area of contract. Martin-Casals and Ribot conclude that “non-pecuniary damage [in Spain] is treated equally in contract and in tort.” B. Winiger, H. Koziol, B. Koch, R. Zimmermann (eds) *Digest of European Tort Law*, Vol 2, *Essential Cases on Damage* (De Gruyter 2011), at p. 630.

81. Boris Starck, Henri Roland, Laurent Boyer, *Obligations I: Responsabilité délictuelle* (4th ed., 1991), §1437.

To be sure, some instances of the twentieth-century jurisprudence were controversial. For example, when a prized racehorse named Lunus was accidentally electrocuted in his stall due to defendant's negligence, the horse's owner received compensation not only for his pecuniary but also for his affective loss.⁸² When the Princesse de Broglie's skin was disfigured by a defective body lotion, she recovered for her temporary inability (for two and a half months) to wear a low-cut gown in society.⁸³ Even the deceased's concubine was admitted to the circle of claimants grieving over his death—a circle that already included respectable wives, children and relatives.⁸⁴ And in a recent surprise, the Court of Cassation declared that inanimate corporations (*sociétés*) may also “suffer” moral damage and may recover in contract or delict.⁸⁵

Today it also seems obvious that the notion of moral damages is no longer simply the child of the Civil Code. It has spread beyond the realm of private law and has gained acceptance in the administrative tribunals of France and in the highest European jurisdictions. It was accepted by the *Conseil d'Etat* in 1961,⁸⁶ and regularly figures in the judgments of the European Court of Justice⁸⁷ and the European Court of Human Rights.⁸⁸

82. Cass. 1^{re} civ., 16 janv. 1962, D. 1962.199, note Rodière.

83. Trib. Civ. de la Seine, 11 Oct. 1937, Gaz. Pal. 1937.2.722. F. Chabas sees the decision as the beginning of the notion “préjudice d'agrément”. F. Chabas, « *Cent ans de responsabilité civile* », Gaz. Pal. juill-août 2000.doct. 1411, no. 62. p. 26.

84. Cass. Crim., 30 Oct. 1930, 1, 145, note Marty; Cass. Ch. Mixte, 27 Feb. 1970, Bull. Ch. Mixte No. 1, D. 1970, 201, note Combaldieu. The circle was already well-populated. In one decision, the Cour d'Appel d'Amiens was faced with sixteen claims resulting from a single death. They were brought by four children, three daughters-in-law, one son-in-law and eight grandchildren. Amiens, 17 nov. 1931, S. 1932.2.118.

85. See Cass. com. 15 mai 2012, no. 11-1028.

86. CE, 24 Nov. 1961 Letisserand, D. 1962, 34.

87. See ECJ 12 Mar. 2002, Case C-168/00 Leitner v. TVI Deutschland Gmk. & Co. See also ECJ, C-63/09 (passenger recovers non-material damage for loss of luggage by airline); see also ECJ 13 Oct. 2011.

88. *Zdanoka c. Lettonie*, 17 June 2004. The ECHR, apparently influenced by the Interamerican Court of Human Rights, has increasingly included nonpecuniary relief in its judgments (des mesures non pécuniaires de réparation). See Sophie Chevallier, “*Le particularisme de la jurisprudence de la Cour Interaméricaine des Droits de l'Homme*,” <http://m2bde.u-paris10.fr/node/2375>.